Office - Supreme Court, U.S.
FILED
JUN 28 1982
ALEXANDER L. STEVAS,
CLERK

81-2385
No.

IN THE

Supreme Court of the United States

October Term, 1981

BRUCE KING, Governor of the State of New Mexico and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

v.

FRANK I. SANCHEZ, *et al.*, RAYMOND VARGAS, *et al.*, D. H. "CHILI" YAZZIE, *et al.*, RONALD G. OLGUIN, *et al.*, and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

Of Counsel:

DAVID A. DONOHOE, P.C.
CHARLES L. WARREN
ALAN J. STATMAN
AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

MICHAEL BROWDIE
1117 Stanford, N.E.
Albuquerque,
New Mexico 87110
(505) 277-5326

PAUL J. KELLY, JR.
HINKLE, COX, EATON, COFFIELD & HENSLEY
600 Hinkle Building
P.O. Box 10
Roswell, New Mexico 88201
(505) 622-6510
Counsel of Record

CHARLES C. SPANN
SPANN, LATIMER & HOLLOWA
914 First Interstate Bank Building
P.O. Box 1031
Albuquerque,
New Mexico 87103
(505) 243-3525
Counsel for Appellants

QUESTION PRESENTED

Whether the district court erred in holding that state legislative apportionment must be based exclusively on raw population census figures.

LIST OF PARTIES TO THE PROCEEDING

The initial action, *Sanchez* v. *King*, Civ. No. 82-0067-M was filed against Appellants Bruce King and Shirley Hooper. The plaintiffs in that action were: Frank I. Sanchez, Antonio Carrasco, Marcelino Polano, Edward Martinez, Yolanda Hermosillo, Patricia Manus, Robert Yazzie, Lorenzo Garcia, Lorenzo R. Sanchez, Merle Garcia, Jose F. Romero, Frank A. Jojola, Joe Madalena, Harry Early, Joseph Ansera, George Montoya, Clyde Leon, Mercel Bird, Benny Salas, Gilbert Pena, Gerald Nailor, Thelma Talachy, Joseph Calabaza, Lupe Duran, Donald Cata, Paul Tafoya, and Tony Reyna. Subsequently five other lawsuits were filed and consolidated with *Sanchez*. Those actions and the party plaintiffs involved were as follows: *Vargas* v. *Hooper*, Civil No. 82-0846 (Plaintiffs Ray M. Vargas, Al Valdez and the New Mexico Civil Liberties Union); *Yazzie* v. *Hooper*, Civil No. 82-0180C1 (Plaintiffs D. H. "Chili" Yazzie, Sol Ondelacy and Lavern Pinnecoose); *Olguin* v. *Hooper*, Civil No. 82-219JB (Plaintiffs Ronald G. Olguin and Marlie Olguin)*; *Marsh* v. *King*, Civil No. 82-0246JB (Plaintiff Patricia Marsh). In addition the United States was granted leave to intervene as a party plaintiff.**

Appellants King and Hooper were named as defendants in each of the actions mentioned above. C. Gene Samberson, Speaker of the House of Representatives of New Mexico, and Roberto Mondragon, Lieutenant Governor of New Mexico and President of the Senate, although initially named as defendants, were subsequently dismissed as improper parties.

---

*This action, although originally filed in state court, was removed to federal court and then consolidated herein.

**Other party plaintiffs intervened in the proceedings below to challenge two collateral orders by the lower court. Those parties (Bingaman, *et al.*) brought their challenge to this Court by way of an earlier application for stay, *Bingaman* v. *King*, 50 U.S.L.W. 3857 (U.S. April 23, 1982), but that matter is unrelated to this appeal on the merits. Appellants have not listed the parties in that matter because their stated interest in the proceedings went only to the collateral orders which are not relevant to this appeal.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
THE QUESTION PRESENTED IS SUBSTANTIAL	6
I. THE *PER SE* REJECTION OF EFFORTS TO AMELIORATE THE EFFECTS OF INELIGIBLE RESIDENTS ON THE POPULATION BASE WILL FRUSTRATE THE LEGITIMATE REAPPORTIONMENT GOALS OF NEW MEXICO AS WELL AS OTHER SIMILARLY SITUATED STATES	6
II. EXCLUSIVE USE OF RAW CENSUS DATA WOULD RESULT IN A DISTORTED DISTRIBUTION OF THE RELEVANT POPULATION WHICH NEW MEXICO HAS PERMISSIBLY CHOSEN AS THE BASIS FOR ITS REAPPORTIONMENT PLAN	7
A. Raw Population Data Is Not An Absolute Standard Against Which Legislative Districts Must be Measured	7
B. Exclusive Use of Raw Census Data as the Basis for Reapportionment in New Mexico – Where There are Numerous Pockets of Ineligibles Spread Among Small Precincts and Election Districts – Would Create Rather Than Cure Malapportionment	11

Page

C. Use of the New Mexico Formula Represents a Sound and Constitutional State Policy Choice With Regard to the Dual Nature of the One-Man, One-Vote Equation 12

CONCLUSION 15

APPENDICES

District Court Opinions

A. 1. Preliminary Injunction of April 5, 1982 ..... A-1

B. 2. Memorandum Opinion and Order of April 8, 1982 ..... B-1

C. Notice of Appeal C-1

D. 1982 N.M. Laws, Special Session, Ch. 1 (House Reapportionment Act) D-1

E. 1982 N.M. Laws, Special Session, Ch. 2 (Senate Reapportionment Act) E-1

Table of Authorities

Cases

Baker v. *Carr*, 369 U.S. 186 (1962) 7

Baker v. *Carr*, 206 F.Supp. 341 (M.D.Tenn. 1962) ... 10

Bingamon v. *King*, 50 U.S.L.W. 3857 (U.S. April 23, 1902) ii,5

Buckley v. *Hoff*, 243 F.Supp. 873 (D.Vt. 1965) 10

Burns v. *Richardson*, 384 U.S. 73 (1966) 2,3,8,9, 10,11,14

Chapman v. *Meier*, 420 U.S. 1 (1975) 2

Ellis v. *Mayor of Baltimore*, 352 F.2d 123 (4th Cir. 1965) 9,10

Federation for American Immigration Reform v. *Klutznick*, 486 F.Supp. 564 (D.D.C.), *appeal dismissed*, 447 U.S. 916 (1980) 8

Gaffney v. *Cummings*, 412 U.S. 735 (1973) 7,8,9,11, 13,14

Goines v. *Heiskell*, 362 F.Supp. 313 (S.D. W.Va. 1973) 10

Gray v. *Sanders*, 372 U.S. 368 (1963) 7

Mahan v. *Howell*, 410 U.S. 315 (1973) 2,14

Martin v. *Venables*, 401 F.Supp 611 (D.Conn. 1975) 10

Reynolds v. *Sims*, 377 U.S. 533 (1964) 7

Sixty-Seventh Minnesota State Senate v. *Beens*, 406 U.S. 187 (1972) 2

White v. *Regester*, 412 U.S. 755 (1973) 2

Winter v. *Docking*, 373 F.Supp. 308 (D.Kans. 1974) 10

WMCA, Inc. v. *Lomenzo*, 382 U.S. 4 (1965) 9

WMCA, Inc. v. *Lomenzo*, 238 F.Supp. 916 (S.D.N.Y.), *aff'd*, 382 U.S. 4 (1965) 10

Constitutional Provision

U.S. Const. amend. XIV 2

Statutory Provisions

28 U.S.C. § 1253 2
28 U.S.C. § 1331 2
28 U.S.C. § 1343(3) 2
28 U.S.C. § 2284 2,5
1982 N.M. Laws, N.M., Special Session, Ch. 1 1,2,4,5,6
1982 N.M. Laws, N.M., Special Session, Ch. 2 1,2,4,5,6

No.

IN THE

Supreme Court of the United States

October Term, 1981

BRUCE KING, Governor of the State of New Mexico and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

v.

FRANK I. SANCHEZ, *et al.*, RAYMOND VARGAS, *et al.*, D. H. "CHILI" YAZZIE, *et al.*, RONALD G. OLGUIN, *et al.*, and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the United States District Court for the District of New Mexico relevant to this appeal are unreported. They are reproduced in full in Appendices A and B, *infra*.

JURISDICTION

Governor Bruce King and Secretary of State Shirley Hooper appeal from the declaratory and injunctive relief afforded below: the district court's injunction and subsequent order declaring New Mexico's Reapportionment Acts unconstitutional, which together combined to halt the scheduled elections for the

New Mexico House of Representatives and Senate under the 1982 Reapportionment Acts. Jurisdiction was conferred on the district court by 28 U.S.C. §§ 1331, 1343(3) and 2284.

The injunction appealed from was issued on April 5, 1982 and the declaratory judgment was issued by way of a Memorandum Opinion and Order entered on April 8, 1982. The Notice of Appeal was filed in the United States District Court for the District of New Mexico on April 29, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1253. *See Chapman* v. *Meier*, 420 U.S. 1, 13-14 (1975); *White* v *Regester*, 412 U.S. 755, 759-61 (1973); *Mahan* v. *Howell*, 410 U.S. 315, 318 (1973); *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187, 194-95 (1972).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The fourteenth amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant portions of the 1982 New Mexico Reapportionment Acts are reprinted in Appendices D & E, *infra*. The pertinent provisions for purposes of this appeal are §§ 1 (Findings), 5 (Precincts) and 6 (Precinct populations) of each Act.

STATEMENT OF THE CASE

At issue in this case is an effort by the State of New Mexico to achieve equality of voting power among its citizens despite substantial concentrations of transients, aliens and other ineligible residents within its total population. In *Burns* v. *Richardson*, 384 U.S. 73 (1966), this Court approved a similar effort

by the State of Hawaii, concluding that states were not required to count aliens, transients, temporary students or convicts in its population base for reapportionment purposes. The district court below, however, turned its back on this Court's past pronouncements in holding that census population equality is the only constitutionally permissible basis for apportionment.

As the evidence introduced in the district court demonstrated, the characteristics and distribution patterns of New Mexico's population would produce wide variations in the voting power of individual voters if apportionment were based solely upon census population. For example, Kirtland Air Force Base is located principally in Precincts 286 and 292. Of 13,129 persons in the census count for those precincts, only 1753, or 13%, voted in the 1980 election. Similarly, in Precinct 215 in Bernalillo County, whose census population total of 2066 is swollen by the presence of students at the State University[1]—many of whom are ineligible to vote or vote elsewhere—the number of votes cast in the 1980 election amounted to only 11.2% of the census population.

This divergence between population distribution and voter distribution occurs throughout the State, with voter-population ratios varying from very low to very high. The pattern is not surprising inasmuch as New Mexico is a thinly-populated state (1980 population 1,299,000) situated on the Mexican border. Its residents include a number of census-counted aliens who are ineligible to vote. Furthermore, New Mexico contains several large transient population concentrations, *e.g.*, the State Penitentiary (Santa Fe County), and government or military installations at Holloman A.F.B. (Otero County), Cannon A.F.B. (Curry County) and Las Vegas State Hospital (San Miguel County), whose residents either cannot vote or else vote in other places. Given these unique circumstances, use of a strict population approach to apportion legislative districts would enhance the voting power of individuals who fortuitously live in areas with an unusually large

[1] The University, with a total enrollment of over 14,000, covers a number of precincts, including No. 215.

concentration of transients or otherwise ineligible residents.

In an effort to remedy this potential deviation from the one-man, one-vote principle, the State of New Mexico adopted the 1982 House Reapportionment Act, and the 1982 Senate Reapportionment Act. 1982 N.M. Laws, Special Session, Ch. 1 (House Reapportionment Act) and Ch. 2 (Senate Reapportionment Act.) These Acts provided for a seventy member House of Representatives and a forty-two member Senate, with the membership of both houses to be elected from single member districts. The basic administrative units for the conduct of elections in New Mexico are the election precincts, which are combined to form the electoral districts. Because the United States Census Bureau does not provide detailed data from which the eligible voter population in each precinct can be determined, the Acts utilize a "derived precinct population" based on the following formula:

$$\frac{\text{County Population According to the 1980 Census}}{\text{Total Votes Cast in County in the Last General Election}} \times \text{Total Votes Cast In the Precinct In the Last General Election} = \text{Derived Precinct Population}$$

Id. at Section 6.

Under the formula, the total population for each county will be equal to that determined by the Census Bureau. *See Id.* at §6(B). In counties in which ineligibles are concentrated in certain precincts, however, the effect of the formula is to distribute the ineligibles over the entire county, thereby ensuring the equality of voting power of citizens within the various precincts. Using the derived precinct populations results in legislative districts that vary only slightly from the derived population norms, with House districts ranging from +4.73% to -4.94%, and Senate districts ranging from +4.86% to -4.98%.

On January 22, 1982 the initial suit was filed challenging the constitutionality of the formula as a means of reapportionment. Five other suits followed.[3] A three-judge court was

[3]In addition to the malapportionment claim against the formula, some plaintiffs claimed that the State reapportionment plans were

convened pursuant to 28 U.S.C. § 2284, and that court ordered all of the lawsuits consolidated with the initial action of *Sanchez* v. *King*. The three-judge court bifurcated the issues for trial and asked the parties to address only the fourteenth amendment malapportionment claim.

On April 5, 1982, after a four day evidentiary hearing preceded by substantial briefing and followed by submissions of extensive proposed findings and conclusions, the court below entered a preliminary injunction enjoining "indefinitely" the filing deadline for legislative candidates wishing to stand for election in the June 1, 1982 primary. *See* Appendix A, *infra*. On April 8, 1982, the three-judge panel entered a Memorandum Opinion and Order declaring unconstitutional the 1982 Reapportionment Acts, holding that the " 'votes-cast formula' . . . leads to a result which is constitutionally impermissible," because it fails to assure the construction of "legislative districts on the basis of actual population." *See* Appendix B, *infra*.[3] The district court did not fault New Mexico's showing at the evidentiary hearing that the State's population make-up would produce significant disparities in individual voting power if a straight population approach were utilized, nor did it find that use of the legislative formula would misallocate the voting power of eligible citizens. Rather, the district court simply

---

racially discriminatory. Initially, they claimed that the State plans intentionally diluted minority voting strength thereby depriving them of the opportunity to elect candidates of their choice to the New Mexico State Legislature. They also claimed that the formula had the effect of discriminating against Indians and Hispanics because those groups have traditionally had a lower voter turnout rate than the general population. The *Olguin* case, which was one of the five cases consolidated below with *Sanchez*, also raised a state law claim with respect to carry-over terms for some senators, but that issue, as well as the purposeful discrimination claims were mooted by the lower court's resolution of the malapportionment claim.

[3] Subsequently, Appellants asked the lower court to stay its ruling, or in the alternative, put off the June 1st primary in its entirety so that the State could make provisions for one integrated primary later in the summer. The lower court granted the latter request, but that order was overturned by this Court's stay in *Binguman* v. *King*, 50 U.S.L.W. 3857 (U.S. April 23, 1982).

disregarded these factors and applied a rigid "population-only" test.

Since that time, the June 1, 1982 non-legislative primary has taken place and the State is complying, as it must, with the lower court's substantive orders. Appellants seek plenary review of those orders, however, because the issues are of great importance to the State of New Mexico in planning for future elections.

THE QUESTION PRESENTED IS SUBSTANTIAL

I. THE *PER SE* REJECTION OF EFFORTS TO AMELIORATE THE EFFECTS OF INELIGIBLE RESIDENTS ON THE POPULATION BASE WILL FRUSTRATE THE LEGITIMATE REAPPORTIONMENT GOALS OF NEW MEXICO AS WELL AS OTHER SIMILARLY SITUATED STATES.

This is not a traditional numerical deviation reapportionment case. At issue is the method of deriving the relevant population, not, as in most reapportionment cases, the permissible range of deviation from the agreed upon relevant population base. Indeed, if the State's method of deriving the relevant population at the precinct level is constitutionally permissible, then clearly the numerical deviations among legislature districts under the 1982 New Mexico Reapportionment Acts are *de minimis*, since in no case is the deviation in excess of 5%, thus establishing the constitutional validity of the acts themselves.

The district court's *per se* rejection of New Mexico's apportionment formula requires this Court's close attention. The ruling that a state is only permitted to apportion on the basis of raw population has far-reaching and adverse implications for New Mexico, as well as having ominous implications for all other states facing similar problems.

As far as New Mexico's particular interests are concerned, the demographic factors which led the State to adopt this approach are, for all practical purposes, permanent. There is no reason to believe that distortions produced by transient population concentrations or the presence of illegal aliens will just go away. Consequently, the district court's decision

effectively condemns the State to a future in which the discrimination and inequity which flow from the application of a population–only approach in New Mexico will become permanently institutionalized.

The same is true for other states confronted with the problems arising from scattered population patterns and pockets of ineligibles. The district court's ruling will handcuff these states if they attempt to bring their apportionment schemes closer to the one-man, one-vote ideal by deviating from a rigid, population-only approach.

The critical issue, then, both for New Mexico and for other similarly situated states is not only that the district court's ruling applied an unduly-strict standard, but also that it imposed a standard that will frustrate constructive efforts to cope with demographic factors in the apportionment effort. Because adoption of such a rigid rule undermines the one-man, one-vote principle, there is an urgent need for review of the district court's decision by this Court.

II. EXCLUSIVE USE OF RAW CENSUS DATA WOULD RESULT IN A DISTORTED DISTRIBUTION OF THE RELEVANT POPULATION WHICH NEW MEXICO HAS PERMISSIBLY CHOSEN AS THE BASIS FOR ITS REAPPORTIONMENT PLAN

A. Raw Population Data Is Not An Absolute Standard Against Which Legislative Districts Must Be Measured

From its inception in *Baker* v. *Carr*, 369 U.S. 186 (1962), the one-man, one-vote principle has aimed at preventing dilution of the individual citizen's right to exercise his or her political rights. This principle is intended, in the words of the Court, to ensure "that every voter is equal to every other voter in his State . . . ." *Gray* v. *Sanders*, 372 U.S. 368, 380 (1963). This Court has found the right to vote unconstitutionally impaired only "when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Gaffney* v. *Cummings*, 412 U.S. 735, 744 (1973), quoting *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964).

Total population data as provided by the U.S. Census Bureau includes within its "count" all residents of a given locale, and is not limited to voting-eligible citizens. *See Federation for American Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (census count required to include illegal aliens), *appeal dismissed*, 447 U.S. 916 (1980). Consequently, exclusive reliance on raw population figures, including as they do ineligible residents, may bring about results which dilute some voters' rights in precisely the manner condemned by the one-man, one-vote principle. As this Court stated in *Burns* v. *Richardson*, 384 U.S. 73, 94-95 (1966):

> Total population figures may thus constitute a substantially distorted reflection of the distribution of state citizenry. If so, a finding that registered voters distribution does not approximate total population distribution is insufficient to establish constitutional deficiency. It is enough if it appears that the distribution of registered voters approximates distribution of state citizens or another permissible population base.

For this reason, this Court has made it clear "that the Equal Protection Clause does not require the states to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured." *Id.* at 91.

The district court erroneously concluded that the State must "construct legislative districts on the basis of actual population" to the exclusion of any other legitimate population basis (Appendix B at 4, *infra*), and that the only allowable deviations from census data are "for obvious errors which can always occur." (Appendix B at 3, *infra*,) This premise, upon which the entire lower court opinion rests, departs radically from this Court's decisions rejecting the idea of mechanical adherence to raw census approaches, betrays the one-man, one-vote principle and, in the case of New Mexico, produces unjustifiable anomalies and distortions in the election process.

In *Gaffney* v. *Cummings*, *supra*, this Court clearly rejected the notion that raw census data should ever rise to the level of

a constitutional imperative. In putting that notion to rest this Court recognized the deficiencies inherent in raw census data:

> [T]otal population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan. The United States census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing, often at different rates in either direction, up or down. Substantial differentials in population growth rates are striking and well-known phenomena. So too, *if it is the weight of a person's vote that matters, total population – even if stable and accurately taken – may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because "census persons" are not voters.* The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States.

412 U.S. at 746-47 (emphasis supplied). The Court in *Gaffney* did not stop at rejecting the claim that a raw census standard is constitutionally mandated but went on to point out that such an approach carries with it a serious threat to the one-man, one-vote principle, cautioning that "[a]n unrealistic overemphasis on raw population figures . . . may submerge. . . other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." *Id.* at 749.[4]

---

[4]The Court has previously upheld a New York reapportionment plan which used a citizen population as a basis, *WMCA Inc.* v. *Lomenzo*, 382 U.S. 4 (1965). In *Burns* v. *Richardson*, *supra*, the Court also approved the temporary registered voter plan based on the unique circumstances in Hawaii.

Pre-*Gaffney*: there was one lower court case which rejected anything but a raw population standard, *see Ellis* v. *Mayor of Baltimore*,

Under the *Burns* standard, New Mexico's population-based, votes-cast formula passes constitutional muster. Not only is raw census population data not constitutionally sacrosanct in the construction of legislative districts, but indeed it is not even preferable as the basis for the construction of legislative districts in New Mexico because such data represents a distorted reflection of the distribution of the State's voting-eligible citizenry. The votes-cast formula meets the particular needs of New Mexico and works well to distribute voting power fairly and equitably and in a manner which approximates the distribution of a permissible population base, thereby meeting the *Burns* standard. These arguments were erroneously ignored by the three-judge panel below.

Furthermore, the efforts of the New Mexico legislature to take ineligibles into account in the reapportionment process was a legitimate exercise of its constitutional powers and may not be ignored. As the Court explained in *Burns*:

> Neither in *Reynolds* v. *Sims* nor in any other decision has this Court suggested that the states are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against

---

352 F.2d 123 (4th Cir. 1965), but even that opinion stood alone. *See, e.g., Buckley* v. *Hoff*, 243 F. Supp. 873 (D.Vt. 1965) (registered voter based reapportionment held valid); *Baker* v. *Carr*, 206 F. Supp. 341 (M.D.Tenn. 1962) (on remand) (Tennessee plan based on qualified voters); *WM.C.A. Inc.* v. *Lomenzo*, 238 F. Supp. 916 (S.D.N.Y.) (citizen population as a valid basis for reapportionment), *aff'd*, 382 U.S. 4 (1965).

Post-*Gaffney*: the lower courts have adopted the view that an apportionment based on factors other than raw census data is constitutionally permissible. *See e.g., Martin* v. *Venables*, 401 F. Supp. 611 (D. Conn. 1975) (town may constitutionally base apportionment on registered voters); *Winter* v. *Docking*, 373 F. Supp. 308 (D. Kans. 1974) (reapportionment based on agricultural census is valid); *cf., Goines* v. *Heiskell, 362 F. Supp. 313, 317 (S.D. W.Va.* 1973) (factors other than population are to be examined and weighed).

> which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such groups involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.

384 U.S. at 92.

Thus, a state's decision to adjust raw population by votes-cast, in order to derive a more accurate estimate of citizen population, represents a permissible choice of democratic theory concerning who ought to be considered in the relevant population base. After *Gaffney* and *Burns* it cannot be said that such a choice is constitutionally impermissible.[5]

B. Exclusive Use of Raw Census Data As The Basis For Reapportionment In New Mexico – Where There Are Numerous Pockets Of Ineligibles Spread Among Small Precincts and Election Districts – Would Create Rather Than Cure Malapportionment

The Court in *Gaffney* might well have had New Mexico in mind when it observed that "[t]he proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States." 412 U.S. at 746-47. We have alluded above[6] to the transient concentrations which contribute materially to the malapportionment dangers presently confronting New Mexico. The State's position on the Mexican border seriously increases the potential for having resident non-citizens counted by the census. With small

---

[5] A registered voter based method would not work under current New Mexico law. There is great liberality in the registration system and much local discretion with respect to purging the rolls. Basing the formula or mode of reapportionment on registered voters would be fraught with opportunities for abuse and manipulation on the local level, thereby undermining the integrity of the system. Indeed, the evidence introduced in the court below demonstrated that in several counties there were more registered voters on the rolls than census population over 18 years of age.

[6] *See* pp. 2-4, *supra*.

precincts and relatively small districts, use of gross population data could grossly distort the votes of the eligible voters. Thus, the State's use of raw population data would not only fail to ameliorate malapportionment as the district court maintains, but instead could create the very malapportionment Appellees claimed below they wish to avoid. *See* Legislative Findings G and H in Section 2, Appendices D & E, *infra*.

While the population-based, votes-cast formula does not eliminate the ineligible problem, it does limit its effects. By spreading ineligibles throughout the county, the formula ensures that pockets of ineligibles within given precincts will not have an undue effect on the legislative district within which the precinct lies. The New Mexico formula therefore permissibly neutralizes ineligibles or at least lessens their effect. On the other hand, use of the raw population model required by the district court would instead cause pockets of malapportionment.

C. Use Of The New Mexico Formula Represents A Sound And Constitutional State Policy Choice With Regard To The Dual Nature Of The One-Man, One-Vote Equation

New Mexico's use of the votes-cast formula represents a sound and constitutional policy choice balancing the equation of the one-man, one-vote principle in a way which gives due regard to both "persons" and "voters." Furthermore, the formula is appropriately tailored to fit the unique problems of New Mexico. The fourteenth amendment standard has sufficient latitude within it to allow the State to respond to those problems.

The New Mexico formula was first arrived at by the legislature to overcome the practical problem of translating census data to a form which could be utilized at the precinct level, and it continues to perform that important function in a way which facilitates the political process of apportioning. *See* Legislative Finding L. In addition, while not ignoring raw census population, the formula filters raw census data through a votes-cast lens in a manner which properly focusses on the duality of the one-man, one-vote principle.

First, as the court stated in *Gaffney* "if it is the weight of a person's vote that matters, total population—even if stable and accurately taken—may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters." 412 U.S. at 746. Thus, with regard to the "person" side of the equation, it is clear that a method based on total population alone will create an imbalance in favor of persons who happen to reside in districts with large numbers of otherwise ineligible persons.

Second, as the Court in *Gaffney* also made clear, census figures do not "tell anything at all about the proportion of all those otherwise eligible individuals whose vote cannot be counted or weighed because they either failed to register or failed to vote." 412 U.S. at 747-48. Therefore, on the "vote" side of the equation, it is apparent that a method based on votes cast alone may strike an imbalance in favor of those voters who happen to reside in districts with good voter turn-out statistics.

New Mexico's formula strikes a balance which moderates the potential excesses of either a "voters only" or a "population only" method. The votes-cast component of the formula, while not eliminating the ineligibles, spreads them throughout the population in such a way as not to overly dilute a given election district. The population base of the formula similarly serves as a check on the votes-cast component, thus providing protection for the rights of eligible voters who do not cast their votes.

Furthermore, the formula works well to balance the diverse factors which are found in the demographics of New Mexico. First, New Mexico has heavy concentrations of ineligibles, and those concentrations differ greatly throughout the varying counties and among precincts within those counties. Second, while the number of some types of ineligibles can be determined with a fair degree of precision and therefore may be accurately discounted (*e.g.*, the under-age population), many are far more difficult to count and as a practical matter defy any systematic method of discounting (*e.g.*, illegal aliens and transients). Third, election districts in New Mexico

are so small that relatively small numbers of ineligibles can grossly dilute any plan of apportionment based solely on population.

There are, for example, no systematic methods to assure that the proper balance will be struck with respect to problem pockets of population found at the State Penitentiary in Santa Fe or at Kirtland Air Force Base in Bernalillo County. *See Mahan* v. *Howell*, 410 U.S. 315, 330-31 (1973) . Indeed, the diversity of New Mexico's resident population, and the unique factors in the demography of the state, militate in favor of the formula's validity as a fair and reasonable method of deriving the relevant precinct population.

Thus, the population-based, votes-cast formula properly balances the excesses of both the "voters only" and "population only" approaches, all within a framework acceptable to the dictates of the fourteenth amendment. The district court ignored this Court's pronouncements in both *Burns* and *Gaffney* in finding the apportionment plan violated the one-man, one-vote principle. Because of the inconsistency of that decision with the established principles of this Court and the potential ramifications to apportionment schemes in New Mexico and other states, this Court should note probable jurisdiction.

CONCLUSION

Because of the substantiality of the constitutional question presented, Appellants respectfully request that the Court note probable jurisdiction and set this case for plenary consideration, including briefs on the merits and oral argument in support thereof.

Respectfully submitted,

Of Counsel:

DAVID A. DONOHOE, P.C.
CHARLES L. WARREN
ALAN J. STATMAN

AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000

MICHAEL BROWDIE
1117 Stanford, N.E.
Albuquerque, New Mexico 87110
(505) 277-5326

PAUL J. KELLY, JR.

HINKLE, COX, EATON, COFFIELD, & HENSLEY
600 Hinkle Building
P.O. Box 10
Roswell, New Mexico 88201
(505) 622-6510
Counsel of Record

CHARLES C. SPANN

SPANN, LATIMER & HOLLOWA
914 First Interstate Bank Building
P.O. Box 1031
Albuquerque, New Mexico 87103
(505) 243-3525

Counsel for Appellants

APPENDIX A
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRANK I. SANCHEZ, *et al.*, *Plaintiffs*, v. BRUCE KING, Governor of New Mexico, *et al.* *Defendants.*	No. 82-67-M Civil
Consolidated With	
RAYMOND VARGAS, *et al.*, *Plaintiffs*, v. SHIRLEY HOOPER, Individually and as Secretary of State of the State of New Mexico, *et al.*, *Defendants.*	No. 82-84-C Civil
Consolidated With	
D. H. "CHILI" YAZZIE, *et al.*, *Plaintiffs*, v. SHIRLEY HOOPER, Secretary of State of New Mexico, *et al.*, *Defendants.*	No. 82-180-C Civil
Consolidated With	
RONALD G. OLGUIN, *et al.*, *Plaintiffs*, v. SHIRLEY HOOPER, Individually and as Secretary of State, *et al.*, *Defendants.*	No. 82-219-JB Civil
Consolidated With	
PATRICIA M. MARSH, *Plaintiff*, v. BRUCE KING, Individually and as Governor of the State of New Mexico, *et al.*, *Defendants.*	No. 82-246-JB Civil

Filed in My Office,
Apr. 5, 1982
Jesse Casaus, Clerk

PRELIMINARY INJUNCTION

Plaintiffs in these consolidated cases are eligible voters in the State of New Mexico and they challenge the 1982 reapportionment of the New Mexico Legislature. 1982 New Mexico Laws, Chapter I and II. Jurisdiction is proper under 28 U.S.C. §§ 1331 and 1343(3) (1976) and a Three-Judge Court has been impanelled. 28 U.S.C. § 2284 (1976). Although plaintiffs offer several grounds to support their challenge to reapportionment, the issue now presented for consideration is the validity of the Reapportionment Acts under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Plaintiffs seek to enjoin the State of New Mexico from conducting any election under the revised apportionment. April 6, 1982 is the deadline for candidates for the New Mexico Senate and House of Representatives to file petitions for candidacy. Although we have not yet had sufficient opportunity to consider the merits of plaintiffs' claims, we do conclude that plaintiffs will more probably than not prevail on the merits of their claims and that plaintiffs will suffer irreparable injury if elections proceed under the revised apportionment. We further find that the proof of threatened injury to the plaintiffs outweighs any damage that the proposed injunction will cause the defendants and that if the injunction issues it will not be adverse to the public interest.

The record demonstrates that the application of the "votes-cast formula" for ascertaining precinct population causes substantial variations between the presumed precinct populations for reapportionment purposes and the actual precinct populations as determined from United States Census data. The deviations demonstrated by plaintiffs appear to exceed any which have heretofore passed constitutional scrutiny. Plaintiffs will suffer irreparable injury if elections proceed under a constitutionally infirm apportionment plan. Now, Therefore,

IT IS ORDERED that the deadline of April 6 1982 for filing petitions for candidacy for the New Mexico House of Representatives and Senate shall be, and hereby is, enjoined indefinitely.

UNITED STATES CIRCUIT JUDGE

/s/
UNITED STATES DISTRICT JUDGE

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRANK I. SANCHEZ, *et al.*, *Plaintiffs,* v. BRUCE KING, Governor of New Mexico, *et al.* *Defendants.*	)	No. 82-67-M Civil
		Consolidated With
RAYMOND VARGAS, *et al.*, *Plaintiffs,* v. SHIRLEY HOOPER, Individually and as Secretary of State of the State of New Mexico, *et al.*, *Defendants.*	)	No. 82-84-C Civil
		Consolidated With
D. H. "CHILI" YAZZIE, *et al.*, *Plaintiffs,* v. SHIRLEY HOOPER, Secretary of State of New Mexico, *et al.*, *Defendants.*	)	No. 82-180-C Civil
		Consolidated With
RONALD G. OLGUIN, *et al.*, *Plaintiffs,* v. SHIRLEY HOOPER, Individually and as Secretary of State, *et al.*, *Defendants.*	)	No. 82-219-JB Civil
		Consolidated With
PATRICIA M. MARSH, *Plaintiff,* v. BRUCE KING, Individually and as Governor of the State of New Mexico, *et al.*, *Defendants.*	)	No. 82-246-JB Civil

Filed in My Office,
Apr. 8, 1982
Jesse Casaus, Clerk

MEMORANDUM OPINION AND ORDER

The record demonstrates that the application of the formula for ascertaining precinct population mandated by the 1982 House Reapportionment Act and the 1982 Senate Reapportionment Act passed by the New Mexico Legislature in special session causes substantional variations between the numbers thereby derived and United States Census figures. This comes about by reason of the inclusion of the *total vote* cast as an element of the formula. These variations are not constant throughout the counties, districts or precincts. With respect to House districts created by the 1982 Reapportionment Act, the maximum deviation of actual population from the population ideal is 94%. With respect to Senate districts, the maximum deviation from the population ideal is 83%. The disparities have such consequence that we conclude that the "votes cast formula" in Section 6 of both Acts leads to a result which is constitutionally impermissible.

The recitations in each of the Acts as to their reasons and purposes cannot be regarded as ground for an exception to a reliance on population figures. "Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." *Reynolds v. Sims*, 377 U.S. 533, 567 (1964). Use of a registered voter or actual voter basis in reapportionment can be sustained only when it produces "a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Burns v. Richardson*, 384 U.S. 73, 93 (1966). And while a state can justify the consideration of factors other than population by showing that those considerations further a rational state policy, those factors "cannot constitutionally be permitted to emasculate the goal of substantial equality." *Mahan v. Howell*, 410 U.S. 315, 326 (1973).

Reapportionment is a legislative function, and the location and shape of districts is within the discretion of the State Legislature so long as the Constitution is complied with. Factors

other than numbers may be appropriate ingredients. Courts are not designed to perform the task of reapportionment and judicial relief becomes appropriate only when a State Legislature fails to reapportion according to federal constitutional standards, after having had an adequate opportunity to do so. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Accordingly, we will allow the New Mexico Legislature an adequate opportunity to reapportion itself. The Legislature must make an honest and good-faith effort to construct the legislative districts as nearly of equal population as is practicable. *Reynolds v. Sims*, at 577.

There was much testimony at the hearing as to the accuracy of the census count, and the use of "substitutions" and "imputations" when actual counts could not be made. The fact remains, however, that the census figures, with adjustments for obvious errors which can always occur, are the only reliable and official figures available.

These census figures are, however, derived from blocks or enumeration districts, the boundaries of which do not coincide, for the most part, with precinct lines. The census blocks or districts use boundaries which are visible to the enumerators on the ground while precinct boundaries do not necessarily follow features on the ground such as roads, ditches or streets. Since the boundaries of the two geographical areas do not coincide, and if the census figures are to be used, it is necessary to allocate population figures from the census areas to the precincts to obtain a precinct count.

This allocation of numbers required when the block or enumeration districts cross precinct lines is a matter, according to the record, which must be carefully done with some knowledge of the community or area and with the use of notations on maps. The record shows that such allocations made by the Bureau of Census, which covered only a limited number of areas, were the product of clerical functions made in the Washington office. Similar clerical functions are available to the State, and no reason appears why the State cannot make similar allocations. However, we do not attempt to instruct the Legislature on the method to employ in again attempting

reapportionment. What we do require is that the Legislature employ a good-faith effort to construct legislative districts on the basis of actual population. Now, Therefore,

IT IS ADJUDGED and DECREED that the 1982 Reapportionment of the New Mexico Legislature, 1982 New Mexico Laws Chapters I and II is unconstitutional.

UNITED STATES CIRCUIT JUDGE

/s/
UNITED STATES DISTRICT JUDGE

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

FRANK I. SANCHEZ, *et al.*,
Plaintiffs,
v.
BRUCE KING, Governor of New Mexico, *et al.*
Defendants.

No. 82-67-M Civil

Consolidated With

RAYMOND VARGAS, *et al.*,
Plaintiffs,
v.
SHIRLEY HOOPER, Individually and as Secretary of State of the State of New Mexico, *et al.*,
Defendants.

No. 82-84-C Civil

Consolidated With

D. H. "CHILI" YAZZIE, *et al.*,
Plaintiffs,
v.
SHIRLEY HOOPER, Secretary of State of New Mexico, *et al.*,
Defendants.

No. 82-180-C Civil

Consolidated With

RONALD G. OLGUIN, *et al.*,
Plaintiffs,
v.
SHIRLEY HOOPER, Individually and as Secretary of State, *et al.*,
Defendants.

No. 82-219-JB Civil

Consolidated With

PATRICIA M. MARSH,
Plaintiff,
v.
BRUCE KING, Individually and as Governor of the State of New Mexico, *et al.*,
Defendants.

No. 82-246-JB Civil

Filed
United States District Court
Roswell, New Mexico
Apr. 29, 1982
Jesse Casaus, Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bruce King and Shirley Hooper, the Defendants in the above-captioned cause, hereby appeal to the Supreme Court of the United States from the Preliminary Injunction, entered in this action on April 5, 1982, and the Memorandum Opinion and Order, entered on April 8, 1982, which continued, indefinitely, the Preliminary Injunction of April 5, 1982.

This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

CHARLES C. SPANN, ESQ.
941 First Interstate Bank Building
P.O. Box 1031
Albuquerque, New Mexico 87103
(505) 243-3525

PAUL J. KELLY, JR., ESQ.
600 Hinkle Building
P.O. Box 10
Roswell, New Mexico 88201
(505) 622-6510

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 1982, a copy of the foregoing Notice of Appeal was mailed, with first class postage prepaid, to the following counsel of record for each of the parties to this cause:

Solicitor General
Department of Justice
Washington, D.C. 20530

Philip R. Higdon, Esq.
Carol S. Leach, Esq.
Bingaman and Higdon, P.A.
417 E. Palace Avenue
Santa Fe, New Mexico 87501

Sarah M. Bradley, Esq.
Bradley and McCulloch
200 Lomas Blvd. NW, Suite 720
Albuquerque, NM 87102

Joseph Goldberg, Esq.
1117 Stanford, N.E.
Albuquerque, NM 87131

Stanley A. Halpin, Jr., Esq.
109 Elm Street
Albuquerque, NM 87102

Jim Schermerhorn, Esq.
c/o P.O. Box 607
Albuquerque, NM 87103

John W. Boyd, Esq.
20 First Plaza, Suite 212
Albuquerque, NM 87102

Raymond W. Schower, Esq.
P.O. Box 1945
Albuquerque, NM 87102

Henry S. Howe, Esq.
420 Broadway
Farmington, NM 87401

Bruce P. Moore, Esq.
219 Shelby
Santa Fe, NM 87501

Attorneys for Defendants

APPENDIX D

THE LEGISLATURE
of the
STATE OF NEW MEXICO

35th Legislature, 2nd Special Session

LAWS 1982

CHAPTER 1

House Voters and Elections Committee Substitute for House Bill 3, as Amended, With Emergency Clause

Introduced by

AN ACT

RELATING TO THE REAPPORTIONMENT OF THE HOUSE OF REPRESENTATIVES; ESTABLISHING REPRESENTATIVE DISTRICTS; PROVIDING THE METHOD OF ELECTING REPRESENTATIVES; PROVIDING FOR THE FILLING OF VACANCIES; FIXING THE NUMBER, RESIDENCE AND TERMS OF REPRESENTATIVES; REPEALING CERTAIN SECTIONS OF THE NMSA 1978; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.–This act may be cited as the "1982 House Reapportionment Act".

Section 2. FINDINGS OF FACT.–The legislature finds that:

A. the equal protection clause of the fourteenth amendment of the constitution of the United States guarantees to each eligible voter of this state that his vote for his elected representative in the state legislature shall be of substantially equal weight as the vote of every other eligible voter in the state for his elected representative in the state legislature;

B. to secure these rights, the legislature has the inherent power and is vested by the constitution of New Mexico with the authority to apportion its membership;

C. while the ideal basic unit of apportionment would be a compact geographical unit of known boundaries, containing an enumerated number of eligible voters small enough in size to permit flexibility in drawing legislative districts and from which there could be an orderly conduct of an election based on such apportionment, no such ideal basic unit exists;

D. the bureau of the census of the United States department of commerce, despite efforts of the state for almost twenty years and after numerous statements by the courts, does not enumerate persons or eligible voters residing in the election precincts of this state nor does it provide alternative basic apportionment units with enumerated populations in such form as to be of practical use in the apportionment of the state legislature;

E. the bureau of the census of the United States department of commerce provided the age breakdown of the population on or about December 15, 1981, too late to alter the work done in preparation for this session by basing the formula or plans on that part of the population of voting age, rather than total population, and thereby possibly achieving plans more in keeping with the spirit of the "one-person, one-vote" concept;

F. the smallest units for which census enumeration is available are enumeration districts and blocks. Enumeration districts, which do have definable boundaries on the map, cover only rural areas of the state or small municipalities of less than ten thousand population for which block data has not been requested. Blocks, which do not have definable boundaries on the map, are difficult to describe, are more than eighteen thousand in number and frequently cross election precinct lines and municipal boundaries. In only a few instances do either enumeration districts or blocks coincide with the election precincts of this state;

G. specific examples have been identified where gross errors exist in the currently available census data such as the reporting of a large residential population where none exists and census population which includes transients, institutionalized persons and persons under the age of eighteen, none of whom are eligible to vote in New Mexico;

H. enumeration errors and inclusions of ineligible voters, wherever they occur in the 1980 census, unequally weigh the votes of the voters for their elected representatives in the legislature;

I. the basic administrative unit for the conduct of elections in New Mexico is the election precinct, upon which the state's entire Election Code is structured, and use of census enumeration districts and city blocks would entail a redrawing and mapping of one thousand one hundred seventy precincts in thirty-three counties in order to conduct an election under the apportionment;

J. redefining of precinct boundaries would not only entail significant administrative cost but could not be completed in time for the holding of the 1982 primary and general elections;

K. the statutory formula contained in the 1982 House Reapportionment Act, while not the perfect solution to the problem of enumerating eligible voters or resident persons in the state's election precincts, is nevertheless a rational and practical solution which has served the state in the 1963, 1965, 1966, 1971 and 1972 apportionments and which was originally suggested by the state district court and has been sustained or unchallenged in three state cases and one federal case in New Mexico;

L. the statutory formula contained in the 1982 House Reapportionment Act for deriving precinct population employs enumerated state and county populations and total votes cast in election precincts as the controlling factors, is impartial in its application, is applied uniformly across the state and implements a rational statewide plan which comes closest to the spirit embodied in the "one-person, one-vote" concept in that it eliminates unequal weight given to the votes of persons resident within districts containing large numbers of persons not eligible to vote; and

M. the reapportionment and districting of the house made by the 1982 House Reapportionment Act constitutes a good faith effort on the part of the thirty-fifth legislature to provide house constituencies within the spirit and limitations of the equal protection clause of the fourteenth amendment of the United States constitution.

Section 3. MEMBERSHIP.–The house shall be composed of seventy members to be elected from districts which shall, insofar as is practicable and possible, be composed of an equal number of persons and be compact and contiguous.

Section 4. RESIDENCE.–Any candidate for the office of representative shall reside in the district for which he files his declaration of candidacy, at the time of such filing. Thereafter, if any representative permanently removes his residence from or maintains no residence in the district from which he

was elected, then he shall be deemed to have resigned and his successor shall be selected as provided in Section 7 of the 1982 House Reapportionment Act.

Section 5. PRECINCTS.–Precinct designations and boundaries used in districting by the legislature for reapportionment shall be those precinct designations and boundaries set by the boards of county commissioners of the respective counties for the 1980 general election unless otherwise specified.

Section 6. PRECINCT POPULATIONS.–

A. Since the bureau of the census of the United States department of commerce does not, in making its enumeration of the population of New Mexico, use precincts as the basic unit of enumeration and since a good faith effort of the legislature to have the bureau of the census provide an enumeration of the population of such precincts or an equivalent computation thereof was to no avail for the 1980 census, it is deemed necessary for the reapportionment plan to derive by formula populations of such precincts as follows:

$$\frac{\text{COUNTY POPULATION ACCORDING TO THE LAST OFFICIAL UNITED STATES CENSUS}}{\text{TOTAL VOTE CAST IN THE COUNTY IN THE MOST RECENT GENERAL ELECTION}} \times \text{TOTAL VOTE CAST IN EACH PRECINCT IN THE MOST RECENT GENERAL ELECTION.}$$

B. The derived population of each representative district shall be the sum of the derived populations of each precinct within the district, and the derived population of all precincts within a county shall add up to the total population for the county provided by the last official United States decennial census.

C. The boards of county commissioners shall not create any precinct which lies in more than one representative district, nor shall the boards of county commissioners divide any precinct so that the divided parts of the precinct are situated in two or more representative districts. Votes cast in any

general, primary or other statewide election from precincts created or divided in violation of this subsection shall be invalid and shall not be counted or canvassed.

Section 7. ELECTIONS–VACANCIES.–

A. Members of the house of representatives shall be elected for terms of two years.

B. If a vacancy occurs in the office of representative for any reason, the vacancy shall be filled as follows:

(1) in any representative district situated wholly within the exterior boundaries of a single county, by appointment of the board of county commissioners of that county;

(2) in any representative district situated within an area composed of two or more counties, by the following method:

(a) the board of county commissioners of each county in the representative district shall submit one name to the governor; and

(b) the governor shall appoint the representative to fill the vacancy from the list of names so submitted; and

(3) all appointments to fill vacancies in the house of representatives shall be for a term ending on December 31 subsequent to the next succeeding general election.

Section 8. PROVISIONAL TERMS.–While the legislature is informed and believes that the apportionment and districting plan set forth in the 1982 House Reapportionment Act is constitutional and constitutes a good faith effort of the legislature to comply with the provisions of the equal protection clause of the fourteenth amendment of the United States constitution, should this belief turn out to be invalid, by reason of a judgment of a court of competent jurisdiction, then members of the house of representatives elected at the 1980 general election shall continue to serve the terms for which they were elected and qualified in 1980 until such time

as the legislature has enacted a valid apportionment and districting plan for the house of representatives, but such extension may not extend beyond January 1, 1984.

Section 9. DISTRICTS.–The reapportionment of the house of representatives shall be as set out in the following seventy sections of the 1982 House Reapportionment Act.

[Sections 10 through 79, listing the counties and precincts included in each district, are omitted.]

Section 80. REPEAL.–Sections 2-7-1 through 2-7-88 NMSA 1978 (being Laws 1972, Chapter 58, Sections 1 through 88) are repealed.

Section 81. EMERGENCY.–It is necessary for the public peace, health and safety that this act take effect immediately.

APPENDIX E

THE LEGISLATURE
of the
STATE OF NEW MEXICO

35th Legislature, 2nd Special Session

LAWS 1982

CHAPTER 2

Senate Rules Committee Substitute for Senate Bill 1, as amended

Introduced by

AN ACT

RELATING TO THE REAPPORTIONMENT OF THE SENATE; ESTABLISHING SENATORIAL DISTRICTS; PROVIDING THE METHOD OF ELECTING SENATORS; PROVIDING FOR THE FILLING OF VACANCIES; FIXING THE NUMBER, RESIDENCE AND TERMS OF SENATORS; REPEALING CERTAIN SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.–This act may be cited as the "1982 Senate Reapportionment Act".

Section 2. FINDINGS OF FACT.–The legislature finds that:

A. the equal protection clause of the fourteenth amendment of the constitution of the United States guarantees to each eligible voter of this state that his vote for his elected representative in the state legislature shall be of substantially equal weight as the vote of every other eligible voter in the state for his elected representative in the state legislature;

B. to secure these rights, the legislature has the inherent power and is vested by the constitution of New Mexico with the authority to apportion its membership;

C. while the ideal basic unit of apportionment would be a compact geographical unit of known boundaries, containing an enumerated number of eligible voters small enough in size to permit flexibility in drawing legislative districts and from which there could be an orderly conduct of an election based on such apportionment, no such ideal basic unit exists;

D. the bureau of the census of the United States department of commerce, despite efforts of the state for almost twenty years and after numerous statements by the courts, does not enumerate persons or eligible voters residing in the election precincts of this state nor does it provide alternative basic apportionment units with enumerated populations in such form as to be of practical use in the apportionment of the state legislature;

E. the smallest units for which census enumeration is available are enumeration districts and blocks. Enumeration districts, which do have definable boundaries on the map, cover only rural areas of the state or small municipalities of less than ten thousand population for which block data has not been requested. Blocks, which do not have definable boundaries on the map, are difficult to describe, are more than eighteen thousand in number and frequently cross election precinct lines and municipal boundaries. In only a few instances do either enumeration districts or blocks coincide with the election precincts of this state;

F. specific examples have been identified where gross errors exist in the currently available census data such as the reporting of a large residential population where none exists and census population which includes transients, institutionalized persons and persons under the age of eighteen, none of whom are eligible to vote in New Mexico;

G. enumeration errors and inclusions of ineligible voters, wherever they occur in the 1980 census, unequally weigh the votes of the voters for their elected representatives in the legislature;

H. the basic administrative unit for the conduct of elections in New Mexico is the election precinct, upon which the state's entire Election Code is structured, and use of census enumeration districts and city blocks would entail a redrawing and mapping of one thousand one hundred seventy precincts in thirty-three counties in order to conduct an election under the apportionment;

I. redefining of precinct boundaries would not only entail significant administrative cost but could not be completed in time for the holding of the 1982 primary and general elections;

J. the statutory formula contained in the 1982 Senate Reapportionment Act, while not the perfect solution to the problem of enumerating eligible voters or resident persons in the state's election precincts, is nevertheless a rational and practical solution which has served the state in the 1963, 1965, 1966, 1971 and 1972 apportionments and which was originally

suggested by the state district court and has been sustained or unchallenged in three state cases and one federal case in New Mexico;

K. the statutory formula contained in the 1982 Senate Reapportionment Act for deriving precinct population employs enumerated state and county populations and total votes cast in election precincts as the controlling factors, is impartial in its application, is applied uniformly across the state and implements a rational statewide plan which comes closest to the spirit embodied in the "one-person, one-vote" concept in that it eliminates unequal weight given to the votes of persons resident within districts containing large numbers of persons not eligible to vote; and

M. the reapportionment and districting of the senate made by the 1982 Senate Reapportionment Act constitutes a good faith effort on the part of the thirty-fifth legislature to provide senate constituencies within the spirit and limitations of the equal protection clause of the fourteenth amendment of the United States constitution.

Section 3. MEMBERSHIP.–The senate shall be composed of forty-two members to be elected from districts which shall, insofar as is practicable and possible, be composed of an equal number of persons and be compact and contiguous.

Section 4. RESIDENCE.–Any candidate for the office of senator shall reside in the district for which he files his declaration of candidacy, at the time of such filing. Thereafter, if any senator permanently removes his residence from or maintains no residence in the district from which he was elected, then he shall be deemed to have resigned and his successor shall be selected as provided in Section 7 of the 1982 Senate Reapportionment Act.

Section 5. PRECINCTS. Precinct designations and boundaries used in districting by the legislature for reapportionment shall be those precinct designations and boundaries set by the boards of county commissioners of the respective counties for the 1980 general election unless otherwise specified.

Section 6. PRECINCT POPULATIONS.–

A. Since the bureau of the census of the United States department of commerce does not, in making its enumeration of the population of New Mexico, use precincts as the basic unit of enumeration and since a good faith effort of the legislature to have the bureau of the census provide an enumeration of the population of such precincts or an equivalent computation thereof was to no avail for the 1980 census, it is deemed necessary for the reapportionment plan to derive by formula populations of such precincts as follows:

$$\frac{\text{COUNTY POPULATION ACCORDING TO THE LAST OFFICIAL UNITED STATES CENSUS}}{\text{TOTAL VOTE CAST IN THE COUNTY IN THE MOST RECENT GENERAL ELECTION}} \times \text{TOTAL VOTE CAST IN EACH PRECINCT IN THE MOST RECENT GENERAL ELECTION.}$$

B. The derived population of each senatorial district shall be the sum of the derived populations of each precinct within the district, and the derived population of all precincts within a county shall add up to the total population for the county provided by the last official United States decennial census.

C. The boards of county commissioners shall not create any precinct which lies in more than one senatorial district, nor shall the boards of county commissioners divide any precinct so that the divided parts of the precinct are situated in two or more senatorial districts. Votes cast in any general, primary or other statewide election from precincts created or divided in violation of this subsection shall be invalid and shall not be counted or canvassed.

Section 7. ELECTIONS–VACANCIES.–

A. Members of the senate shall be elected for terms of four years.

B. If a vacancy occurs in the office of senator for any reason, the vacancy shall be filled as follows:

(1) in any senatorial district situated wholly within the exterior boundaries of a single county, by appointment of the board of county commissioners of that county;

(2) in any senatorial district situated within an area composed of two or more counties, by the following method:

(a) the board of county commissioners of each county in the senatorial district shall submit one name to the governor; and

(b) the governor shall appoint the senator to fill the vacancy from the list of names so submitted;

(3) all appointments to fill vacancies in the senate shall be for a term ending on December 31 subsequent to the next succeeding general election at which general election a person shall be elected to fill the remainder of the unexpired term; and

(4) any appointment to fill a vacancy in the senate made after the effective date of this 1982 act shall be for a term ending December 31, 1984 and from the districts as set out in the 1972 apportionment act.

Section 8. DISTRICTS.–The reapportionment of the senate shall be as set out in the following forty-two sections of the 1982 Senate Reapportionment Act.

[Sections 9 through 50, listing the counties and precincts included in each district, are omitted.]

Section 51. ELIMINATION OF UNEQUAL STAGGERING–DECLARATION OF LEGISLATIVE FINDINGS AND INTENT.–The legislature finds and declares that:

A. the constitution of New Mexico does not require staggered terms for senators;

B. only once since statehood has the apportionment for the senate provided for staggered terms for an equal number of senators;

C. it was the intent of the 1972 Senate Reapportionment Act that the senate be no longer staggered with re-

spect to the terms of its members; however, because of a special court ruling, there is de facto unequal staggering of terms in that thirty-five senators are elected at one general election and seven senators are elected at the subsequent general election;

D. such unequal staggering is contrary to the intent and theory of having staggered terms and serves no functional or theoretical purpose and is not in the best interest of the senate; and

E. it is in the best interest of the senate and the legislature that all such unequal staggering be abolished, and it is the intent of the 1982 Senate Reapportionment Act that all members of the senate be elected at the same general election for the same term of office except where necessary to fill a vacancy in the office of a senator for the remainder of the unexpired term.

Section 52. FIRST ELECTION OF SENATORS.–The first election of members of the senate after the effective date of the 1982 Senate Reapportionment Act shall be at the general election in 1984.

Section 53. REPEAL.–Sections 2-8-1 through 2-8-53 NMSA 1978 (being Laws 1972, Chapter 79, Sections 1 through 53) are repealed.